BOOK REVIEWS

PRINCIPLES OF CONTRACT. By SIR FREDERICK POLLOCK. Ninth Edition. London: STEVENS & SON, LTD. 1921. pp. lx, 820.

It is the hope of the profession and of law students everywhere, that some day or other, by some author or other, a single volume text book on contracts will be produced, written so clearly and with such precision, that there may be gathered from it,

1. What the law is on a common topic coming under that general subject, in instances where the law has been definitely settled;

2. A comprehendable statement of divergent views of authorities in instances where the law has not been settled; and

3. What sound principle and scientific treatment would require in both of the foregoing sets of instances.

A few text books, not on the subject of contracts, have been written in something approaching that method, and therefore, the hope may still be entertained that this field likewise may be covered.

Sir Frederick Pollock has been constructing a single volume book on contracts for many years, and the present issue is the ninth edition. It is a thoughtful contribution and most interesting in many of its discussions of mooted and other questions, but his consideration of some important points leaves much to be desired, in the way of elucidation.

After stating in substance in his preface that there may be instances in which principle must be sacrificed to expediency, he proceeds to illustrate the point by his text at pages 38-42, covering the question of contract by correspondence, and, as it would seem, only forces the mind to the conclusion that in that very important part of the law of contracts, expediency or practicability does not in the slightest degree require the sacrifice of principle, but that, on the contrary, even expediency itself would have been better served by adherence to the commonsense but scientific disposition of the matter. The question with which he is dealing is whether when an offer is made by letter, the acceptance is complete and the contract created by the mailing of the letter of acceptance. It would seem that the distinction should have been made at the outset in dealing with this problem between bilateral contracts on the one hand, and unilateral contracts on the other. If the letter of offer calls for the dispatching or sending by mail of a promissory note or a bond or an insurance policy, or some other "thing," then, of course, the contract is created by the act of mailing which, at that point, is a delivery of the "thing," because the offer called for an act and not for a counter-promise. There is no divergence of opinion either in the decided cases, or among other authorities on this point. So much might have been said clearly and definitely and thereby all of that portion of the problem eliminated. There is no problem about that. It has been solved long ago, and solved correctly.

The only question about which there has ever been a divergence of opinion, as far as this topic is concerned, is whether, in the case of an offer contemplating a *bilateral contract*, the contract shall be deemed to have been created by the mailing of the letter of acceptance. There never should have been, and there never has been any doubt about the requirement of principles in this regard. In the nature of things, and by the very character of a promise no promise can come into existence without communication of it to the promisee. This answers the question with regard to contracts by correspondence when the contract contemplated is a bilateral contract. The contract cannot be created by any

possibility unless and until the counter-promise has been received by, and communicated to the offeror. When one launches into the dangerous field of "expediency," he will not be disturbed in respect of the requirements of principle, because at the very worst, the arguments from expediency are evenly balanced. But it would seem that if expediency is to be the test, it is more expedient to leave the offeree in doubt as to whether a contract has been made or not, than to leave the offeror in doubt. Inasmuch as the difficulty only arises where the letter of acceptance from the offeree to the offeror has been lost, it would seem to be more expedient to deprive the offeree of a contract, than to impose upon the offeror a contract, because the former injury at the worst is only negative, whereas the latter injury is positive. Furthermore, if comparative hardship is to be the test, then there will be found cases of very great hardship in following the rule of *Adams* v. *Lindsell*.[1]

A writes a letter to B proposing marriage, and B desiring to make the contract, writes and mails to A a letter accepting his offer, and promising to marry him. The letter is lost in the mail. After waiting more than a reasonable time, A thinking that B has declined his offer, marries C. Thereupon, at the suit of B for breach of promise, A will be obliged to pay perhaps heavy damages for not having married the woman whom he was most eager to marry. No! the theory of expediency as a justification for the proposition that in such a case the contract is made upon the mailing of the letter, no matter what happens to the letter, will not be found to be expedient at all. And it may further be said in this connection that of all the many reasons given and attempted to be given for the support of the doctrine of *Adams* v. *Lindsell*,[2] the argument from expediency is the most plausible ever advanced. From which it may be gathered that there is no sound reason at all which can be presented for the rule in cases of "contracts by correspondence."

It is a delight to turn from the author's discussion of a topic on which he does not seem to have advanced the science, to one in connection with which he has made a pronouncement of far-reaching importance, and of interest because it demonstrates a process of clear-thinking. The author states the proposition only indirectly, but nevertheless, it is most cheering and helpful. The proposition as it might be stated is that impossibility of performance is never a defense in and of itself. The language in which the author thus states it is:

"Accordingly Impossibility has definitely ceased to be an adequate or useful category, and I have embodied the contents of the suppressed chapter, so far as they appear still material, in the new chapter on Conditions." [3]

The thing to be noted about this is that unless there be a condition in the contract, the defendant will not be protected against the suit of the other party in the contract; that it is only as there is a condition, express, implied in fact, or implied in law, that he will have an adequate defense.

It would seem that nothing is to be gained in clearness by the use of such terms as "discontinuous performance" used on page 286; or the use of "rescission" where it is obvious that the word used should have been "repudiation." And such misuse of terms has led, in the text, as such misused matters leads everywhere, to confusion of thought, and inadequacy of expression to convey the principle. The misuse of the term "rescission" for the term "repudiation," has, as everybody knows, led to an almost inextricable confusion in decisions of the courts. No single party to a contract ever has the right or even the power to

[1] (1818) 1 B. & Ald. 681.
[2] *Ibid.*
[3] P. IX.

"rescind" the contract; whereas, frequently, one of the parties to the contract has a perfect right to repudiate it and refuse to perform it. A scientific treatise can only be written by the precise and scientific use of terms with strict reference to their scientific meaning.

Again, the author defines every consideration as a "forbearance." This is regrettable because the term "forbearance" has a very clear, distinct, legally scientific meaning, to wit: refraining from prosecuting an alleged claim. And it is not true, even in the sense in which the author uses the term "forbearance" that it is the only kind of consideration. If he means by it, "forbearance to exercise a legal right," then it is much better to say that every consideration is the surrender of a legal right, as that definition will cover both negative and positive things.

One finds it difficult to understand why there should be inserted in the volume a discussion of corporation contracts, just as though corporation contracts were any different from any other contracts, in the legal principles applicable out of contract law. Once you have the power in the corporation to make the contract, and the properly authorized officers executing or agreeing upon the contract, you have covered the only matters which distinguish corporation contracts from any other contracts, and those things belong to corporation law, and not to contract law.

Now, the distinction between breaches of contracts *"in limine"* and breaches of contracts "after part performance" is a perfectly simple and clear distinction, so well established in the law that fortunately the principle has been elucidated over and over again. And yet, it may be said, with all possible grace and deference, that the discussion of this question on page 286 and the following pages, is not calculated to give to the student's mind a clear grasp of the principles laid down in the authorities, or the reasons for them.

In Chapter XIII on "Agreements of Imperfect Obligation," the author treats, among other things, the Statute of Limitations and the Statute of Frauds as defenses to actions on contracts. May it be said that by the very heading of the chapter as thus given, the mind of the reader might very well be misled at the outset from the train of thought which would give him a sound and clear appreciation of the effect of those statutes as defenses among other incidents of these so-called "Agreements of Imperfect Obligation." As a matter of law and of fact, there is no imperfection of obligation in such cases whatsoever. The contracts are perfectly sound and binding, and it is only the remedy upon the contracts which is affected, if the contracts be affected at all. Both of those defenses may be easily waived by the defendant and recovery then had upon the contracts, showing that there never was anything inherently defective in the obligation assumed. The Statute of Frauds requires nothing except that in the case of two classes of contracts, the evidence of the same shall be in writing at the time of the trial, signed by the party to be charged. In the case of the Statute of Limitations, the only point is that the remedy on a contract *may be lost,* if diligence be not followed in prosecution of the claim.

The original treatise by this author, that is to say, the first edition, was interesting, instructive and promising as all of the eight subsequent editions, including this one, have been; and when this ninth edition is read in conjunction with other text books on the subject, and many reported decisions dealing with different topics treated in it, and when the reader makes the scholarly treatment of various and sundry phases of the law of contracts by this author a part of his knowledge of the subject, there will be a good result reached in respect of a broad appreciation of the problems in this branch of the law, and the treatment of them, but he will need the broad study in order to make this book a handy working tool for his purposes.

The genius of the learned author, his high talent for patient investigation, his persistence in the scholarly study of this subject, all call for the highest commendation, and will continue to receive, as they have in the past, the admiration of those who come in contact with his work. His higher powers and capacities will, in some future edition, doubtless present in a single volume, such as is the compass of this present book, an exposition of the settled points of contract law, a comprehensive statement of divergent decisions on topics of this law at which authorities are at odds, and in connection with all of such discussions, a commanding view of the clear principles which should, and in most instances do, as a matter of decided cases, govern the disposition of the problems under consideration.

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LAW AND BUSINESS. By WILLIAM H. SPENCER. Chicago: THE UNIVERSITY OF CHICAGO PRESS. 1922. Vol. I, pp. xviii, 611; Vol. II, pp. viii, 670; Vol III, pp. xviii, 653.

Teachers in schools of business are herewith presented with a three volume collection of cases for the study of the most important of the branches of law influencing business administration.

The volumes occupy a place in the series of texts that are being produced for the convenience of such schools of business as are committed to the principle that collegiate training for business administration, whether graduate or undergraduate, must afford at least an introduction to the organization of the society in which business activities are carried on, and more than a superficial acquaintance with the limitations imposed by environment, both physical and social, on business policy and practice.

The key to a proper understanding of the purpose and the great value of this work is found in the compiler's creed that "there are underlying principles of business administration, and schools of business can do no more than teach those principles." Accordingly, the cases chosen deal with such legal principles as appear to be underlying the relations of a business man: (a) to his market; (b) to the administration of his finances; (c) to risk bearing; (d) to his labor; (e) to the form of the business unit; *i. e.*, the organization.

The volumes and the arrangement of their material are strongly persuasive of the value of the case method in teaching the legal subjects indispensable to the curricula of modern schools of business. It is not hard to believe that legal principle stated as such makes but slight appeal to students who have not already pursued the study of law far enough to have developed an interest in the purely legal aspects of any given problem. But a typical situation presented in the statement of facts of a case offered to the student of business activities and problems, may well awaken his interest to a perusal of the reactions of lawyers and judges to the problem indicated in the facts.

To aid the student in an analysis of the cases the author has included in the first volume a number of pages of carefully chosen and well written material, attempting to give a "background for the study of law." The wisdom of the attempt is doubtful, however, since most teachers of law and many lawyers must know the almost total dependence of the student on class lectures to explain even those few fundamentals of the organization and procedure of our legal system that are essential to an understanding of the legal principles of any given case. It seems safe to say that the instructor who is not prepared to supply the background through lectures cannot gain his preparation from the